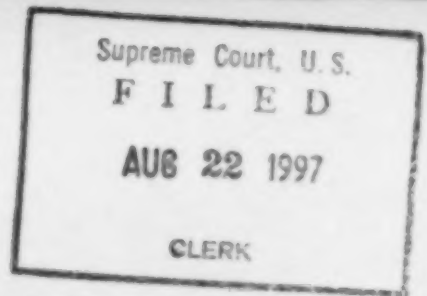


(6)
No. 96-1037



IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE KIOWA TRIBE OF OKLAHOMA,
Petitioner,
v.

MANUFACTURING TECHNOLOGIES, INC.,
an Oklahoma corporation,
Respondent.

On Writ of Certiorari to the Court of Appeals,
Division I, for the State of Oklahoma

JOINT APPENDIX

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Petition For Writ of Certiorari Filed December 23, 1996
Certiorari Granted June 27, 1997

82 pp

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DISTRICT COURT DOCKET SHEET

Civil Action Docket
Clerk of Court Oklahoma County, Oklahoma

Judge: Division D-4 Civil - Judge UN
File Date: 08/24/93
Case-ID: CJ-OK-93-006523-64

Promissory Note

Plaintiff/Attorney: Manufacturing Technologies, Inc.
Patterson, Jr., John E.

Defendant/Attorney: Kiowa Tribe of Oklahoma
Wallace, R. Brown

<u>Date</u>	<u>Progress In Case</u>
08/24/93	Petition
09/15/93	Motion to Dismiss
10/01/93	Response of Plaintiff to Defendant's Motion to Dismiss
09/21/94	Entry of Motion to Dismiss - Overruled - Tribal immunity does not extend to going away from the reservation and engaging in business ventures. Defendant granted 20 days to answer. Leamon Freeman, Judge
10/14/94	Answer of Defendant Kiowa Tribe of Oklahoma
09/06/95	Plaintiff's Motion for Summary Judgment
09/20/95	Affidavit

JA-2

09/20/95 Defendant Kiowa Tribe of Oklahoma's Brief in Opposition to Plaintiff's Motion for Summary Judgment

09/29/95 Entry of Summary Judgment Sustained, Division D-4, Civil - Lemon F.

09/29/95 Entry of Plaintiff's Motion for Summary Judgment: Sustained. This Action on a Note where the Defendant received benefit of the Note does not entitle them to say I got your money or goods and now we don't have to pay because we are immune. This is a contract action, not a damage suit. Judgment for Plaintiff for \$285,000.00 plus interest, costs and attorney fees. Leamon Freeman, Judge

10/30/95 Judgment/L. Freeman

11/09/95 Petition in Error (and Preliminary Statement) Supreme Court #86489

11/09/95 Designation of Record

11/14/95 Certificate of Appeal Filed - Supreme Court #86489

11/20/95 District Court Clerk's Certification of Record/Fast Track

11/28/95 Response to Petition in Error and Preliminary Statement

11/29/95 Amendment to Plaintiff's Motion for Attorney's Fees and Costs

11/29/95 Plaintiff's Brief in Support of Motion for Attorney's Fees and Costs

11/29/95 Plaintiff's Motion for Attorney's Fees and Costs

12/04/95 Petition in Error (and Preliminary Statement)

JA-3

12/08/95 Defendant Kiowa Tribe of Oklahoma's Objection to Motion for Attorney Fees and Costs

01/05/96 Order Awarding Attorney's Fees and Costs/L. Freeman

01/05/96 Entry of Plaintiff's Motion for Attorney Fees and Costs: Sustained per J.E./L. Freeman

02/01/96 Amendment to Petition in Error/SC #86489

02/20/96 Response to Amended Petition in Error/SC #86489

07/19/96 Answer to Petition for Certiorari/SC #86489

10/09/96 Mandate: Affirmed R:1831 F:3030

JA-4

APPELLATE COURT DOCKET SHEET

County: Oklahoma
 Case Number: CJ936523
 Trial Court: District
 Type: SD
 Trial Court Judge: Judge Leamon Freeman

Appellee(s): Manufacturing Technologies, Inc.,
 Appellant(s): Kiowa Tribe of Oklahoma

Appellant Attorney: R. Brown Wallace
 Shelia D. Tims
 500 W. Main
 Oklahoma City, OK 73102

Appellee Attorney: John E. Patterson
 210 Two Corporate Plaza
 5555 N. Grand Plaza
 Oklahoma City, OK 73112

Honorable Leamon Freeman
 Oklahoma County Courthouse
 321 Park Avenue, 2nd Floor
 Oklahoma City, OK 73102

Date	DOOA	Docket Information
10/30/95	DOOA	Judgment filed
11/09/95	TEXT	Certificate of Appeal Issued
11/09/95	PFST	Petition in Error
11/28/95	RFST	Response to Petition

JA-5

12/01/95	TEXT	Appellant's Appeal for Order Permitting Submission of Appellate Briefs
12/01/95	MRTN	Appellant's Appeal to Retain Case for Decision
12/01/95	APIE	Amended Petition in Error
12/01/95	TREC	Appellant's Record (attached to APIE; 0+14 copies)
01/08/96	TEXT	Appellant's Suggestions of Additional Authorities
02/01/96	APIE	Amended Petition in Error
02/20/96	TEXT	Response to Amended Petition in Error
02/29/96	MRDE	Journal Entry: Motion to Retain Denied. N/Attorneys
03/14/96	COA1	Cause Assigned to COA-OKC
06/28/96	OPIN	Journal Entry: Memo Opinion - Affirmed--Jones, P.J. Concur: Garrett, J.; Joplin, J.; C/Attorneys, DC Judge - Summary
06/28/96	1002	Affirmed
07/09/96	ATPC	Appellant's Petition for Certiorari (\$) COA/OKC
07/19/96	TEXT	Answer to Petition for Certiorari
09/25/96	CTDE	Journal Entry: ATPC Denied - Concur: Wilson, C.J., Hodges, Lavender, Simms, Hargrave, Opala, Watt, JJ. Dissent: Kauger, VCJ, Summers, J. - N/Attorneys.
10/03/96	MAND	Mandate issued
10/11/96	RCMD	Receipt for Mandate
01/14/97	TEXT	Letter F/USSC Petition for Certiorari filed 12/23/96; on docket as 961037

JA-6

07/08/97 TEXT Petition for Writ of Certiorari granted
in the USSC

JA-7

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING TECHNOLOGIES,)
INC., an Oklahoma Corporation,)

Plaintiff,)

v.) No. CJ-93-6523

KIOWA TRIBE OF OKLAHOMA,)

Defendant.)

DISTRICT COURT CLERK'S
CERTIFICATION OF RECORD

Tom Petuskey, the Court Clerk of Oklahoma County,
State of Oklahoma, or his Deputy, hereby certifies that the
following documents have been reviewed and are true and
accurate copies of the originals on file in the Oklahoma
County Court Clerk's file maintained for the above-styled
cause.

A. Appellee Manufacturing Technologies Petition
on a Promissory Note filed August 24, 1993.

B. Appellant Kiowa Tribe's Motion to Dismiss,
with Brief in Support attached, filed September 15, 1993.

JA-8

C. Appellee Manufacturing Technologies' Response to Appellant Kiowa Tribe's Motion to Dismiss filed October 1, 1993.

D. Appellant Kiowa Tribe's Answer to Appellee Manufacturing Technologies Petition On A Promissory Note filed October 14, 1994.

E. Appellee Manufacturing Technologies Motion for Summary Judgment filed September 6, 1995.

F. Appellant Kiowa Tribe's Affidavit of Billy Evans Horse filed September 20, 1995.

G. Appellant Kiowa Tribe's Brief in Opposition to Appellee Manufacturing Technologies Motion for Summary Judgement filed September 20, 1995.

H. District Court's Judgment for Appellee Manufacturing Technologies filed October 30, 1995.

DATED THIS 20 DAY OF NOVEMBER, 1995.

TOM PETUSKEY, COURT CLERK

By: S/Alice Ann Palmer
(Deputy Court Clerk)

(SEAL)

JA-9

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING)	
TECHNOLOGIES, INC.,)	
an Oklahoma Corporation,)	
)	
Plaintiff,)	
)	
v.)	No. CJ-93-6523-64
)	
KIOWA TRIBE OF)	
OKLAHOMA,)	
)	
Defendant.)	

PETITION ON A PROMISSORY NOTE

Plaintiff, for cause of action against the Defendant, alleges and states as follows:

1. Defendant agreed to purchase capital stock of Clinton-Sherman Aviation, Inc. from Plaintiff by Letter of Agreement dated March 19, 1990. As part of said transaction Plaintiff agreed to loan Defendant the sum of \$285,000.00 to enable Defendant to complete the said purchase.

2. On April 3, 1990, Defendant executed and delivered to Plaintiff in Oklahoma City, a Promissory Note in the principal sum of \$285,000.00, evidencing the said loan, a copy of which is attached hereto and marked Exhibit "A". Payments thereunder were to be made to Plaintiff at its address in Oklahoma City, Oklahoma.

3. Defendant has defaulted in payment of the Note and owes Plaintiff the full amount of principal and interest provided for therein.

WHEREFORE Plaintiff prays for judgment against Defendant, Kiowa Tribe of Oklahoma, in the sum of \$285,000.00 with interest thereon as specified in the Note, costs and attorney fees.

S/John E. Patterson, Jr.

JOHN E. PATTERSON, JR., OBA #6953
525 Central Park Drive, Suite 201
Oklahoma City, Oklahoma 73105
Telephone No. (405) 525-5241
Fax No. (405) 525-5256

Attorney for Plaintiff

PROMISSORY NOTE

\$285,000.00

April 8, 1990
Carnegie, Oklahoma

FOR VALUE RECEIVED, the undersigned Kiowa Tribe of Oklahoma ("Maker"), agrees to the terms of this Note and promises to pay to the order of Manufacturing Technologies, Inc. ("Lender") at 3212 East Interstate 240, Oklahoma City, Oklahoma 73135, or at such other place as may be designated in writing by the holder of this Note, the principal sum of Two Hundred Eighty-Five Thousand and no/100 Dollars (\$285,000.00), together with interest thereon at the rate of 10% per annum, payable \$47,500 30 days from the date of this Note, with the balance in full as to both principal and interest ninety days from the date of this note. Any principal or interest amount not paid when due shall bear interest until paid at a rate of 5% per annum greater than the per annum interest rate prevailing at the time the unpaid amount became due, but in no event at a rate less than 15% per annum or at an interest rate either before or after Maturity which is greater than permitted by law. Interest on this Note is calculated on the actual number of day elapsed on a basis of a 360 day year unless otherwise indicated above. For purposes of computing interest on this Note, payments of all or any portion of the Principal Amount will not be deemed to have been made until such payments are received by holder in collected funds.

ALL PARTIES PRINCIPAL. All parties liable for payment hereunder shall each be regarded as a principal and each party agrees that any party hereto with approval of

holder and without notice to other parties may from time to time renew this Note or consent to one or more extensions or deferrals of Maturity Date for any term or terms, and all parties shall be liable in some manner as on original note. All parties liable for payment hereunder waive presentment, notice of dishonor and protest and consent to partial payments, substitutions or release of collateral and to addition or release of any party or guarantor.

ADVANCES AND PAYMENT. It is agreed that the sum of all advances under this Note may exceed the Principal Amount as shown above, but the unpaid balance shall never exceed said Principal Amount. Advances and payments on Note shall be recorded on records of Lender and such records shall be prima facie evidence of such advances, payments and unpaid principal balance. Subsequent advances and the procedures described herein shall not be construed or interpreted as granting a continuing line of credit for Principal Amount. Lender reserves the right to apply any payment by Maker, or for account of Maker, toward this Note or any other obligation of Maker to Lender.

COLLATERAL. This Note and all other obligations of Maker to Lender, and all renewals or extensions thereof, are secured by all collateral securing this Note and by all other security interests heretofore or hereafter granted to Lender as more specifically described in Security Agreements and other securing documentation.

ACCELERATION. At option of holder, the unpaid balance of this Note and all other obligations of Maker to

holder, whether direct or indirect, absolute or contingent, now existing or hereafter arising, shall become immediately due and payable without notice or demand upon the occurrence or existence of any of following events or conditions: (a) Any payment required by this Note or by any other note or obligation of Maker to holder or to others is not made when due or the occurrence or existence of any event which results in acceleration of the maturity of any obligation of Maker to holder or to others under any promissory note, agreement or undertaking; (b) Maker defaults in performance of any covenant, obligation, warranty or provision contained in any loan agreement or in any instrument or document securing or relating to this Note or any other note or obligation of Maker to holder or to others; (c) Any warranty, representation, financial information or statement made or furnished to Lender by or in behalf of Maker proves to have been false in any material respect when made or furnished; (d) The making of any levy against or seizure, garnishment or attachment of any collateral; (e) Any time Lender in good faith believes prospect of payment of this Note is impaired; (f) When in the judgment of Lender the collateral, if any, becomes unsatisfactory or insufficient either in character or value, and upon request, Maker fails to provide additional collateral as required by Lender; (g) Loss, theft, substantial damage or destruction of collateral, if any; (h) Death, dissolution, change in management or termination of existence of any Maker; or (i) Appointment of a receiver over any part of the property of any Maker, the assignment of property by any Maker for the benefit of creditors, or the commencement of any proceedings under any bankruptcy or insolvency laws by or against any party liable, directly or indirectly, hereunder.

WAIVERS AND GOVERNING LAW. No waiver by holder of any payment or other right under this Note or any related agreement or documentation shall operate as a waiver of any other payment or right. Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma.

COLLECTION COSTS. All parties liable for payment hereunder agree to pay reasonable costs of collection, including an attorney's fee of a minimum of 15% of all sums due upon default.

RIGHT OF OFFSET. Any indebtedness due from holder hereof to Maker or any party hereto including, but without limitation, any deposits or credit balances due from holder, is pledged to secure payment of this Note and any other obligations to holder of Maker or any party hereto, and may at any time while the whole or any part of such obligation remains unpaid, either before or after Maturity hereof, be appropriated, held or applied toward the payment of this Note or any other obligation to holder of Maker or any party hereto.

IN WITNESS WHEREOF, the Maker has executed this Note on the date first above written.

Kiowa Tribe of Oklahoma

S/J.T. Goombi

J. T. Goombi, Chairman
Carnegie, Oklahoma 73015

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING)
TECHNOLOGIES, INC.,)

Plaintiff,)

v.) No. CJ-93-6523-64

KIOWA TRIBE OF)
OKLAHOMA,)

Defendant.)

MOTION TO DISMISS

COMES NOW the defendant, the Kiowa Tribe of Oklahoma, and moves this Court to dismiss the plaintiff's petition on a promissory note on the following grounds:

1. This Court lacks jurisdiction over the subject matter of the action. 12 O.S. § 2012 B (1). Specifically, the Kiowa Tribe of Oklahoma is a federally recognized tribe. Since the Kiowa Tribe has not expressly waived its defense of sovereign immunity, the Court does not have jurisdiction over the subject matter.

2. This Court lacks jurisdiction over the person of the defendant. 12 O.S. § 2012 B (2).

3. Because the petition and summons were served outside the jurisdiction of the State of Oklahoma, the insufficiency of service of process is asserted. 12 O.S. § 2012 (B (5)). Specifically, summons was served by Don McLaughlin, Deputy Sheriff of Caddo County, Oklahoma, at the Tribal Complex in Carnegie, Oklahoma. The property occupied by the Tribal Complex is held in trust by the United States of America for the Kiowa Tribe as beneficial owners. This land is defined as "Indian Country", which Congress has defined broadly in 18 USCS § 1151 to include (1) formal and informal reservations, (2) dependent Indian communities, and (3) Indian allotments, whether restricted or held in trust by the United States.

WHEREFORE, the defendant, the Kiowa Tribe of Oklahoma, moves the Court to dismiss the plaintiff's petition on a promissory note, and for such other relief as the Court may deem just and proper.

S/Jim Merz

JIM MERZ, OBA #6953
JOHN STACY, OBA #8531
1330 N. Classen Blvd., Suite 301
Oklahoma City, Oklahoma 73106
(405) 235-2226

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 1993, a true and correct copy of the above and foregoing pleading was mailed, postage prepaid thereon, to:

John Patterson, Jr.
525 Central Park Drive, Suite 201
Oklahoma City, Oklahoma 73105

ATTORNEY FOR PLAINTIFF

S/Jim Merz

JIM MERZ

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING)	
TECHNOLOGIES, INC.,)	
)	
Plaintiff,)	
)	
v.)	No. CJ-93-6523-64
)	
KIOWA TRIBE OF)	
OKLAHOMA,)	
)	
Defendant.)	

BRIEF IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS
PLAINTIFF'S PETITION
ON A PROMISSORY NOTE

COMES NOW the Defendant, the Kiowa Tribe of Oklahoma (the "Tribe" and/or "defendant") and hereby submits the following brief in support of its Motion To Dismiss Plaintiff's Petition On A Promissory Note.

Copies of petition and related documents are attached to this brief in support of motion to dismiss.

ARGUMENT AND AUTHORITY

PROPOSITION I

THE DISTRICT COURT LACKS JURISDICTION OVER THE KIOWA TRIBE AND MUST THEREFORE BE PROHIBITED FROM ADJUDICATING THE CLAIMS PRESENTED BY PLAINTIFF.

Because the District Court lacks jurisdiction over the Tribe under principles of tribal sovereign immunity, it must be prohibited from proceeding further in the action filed by plaintiff.

It is now well established that Indian tribes possess the same common law immunity from suit as that enjoyed by other sovereign powers, including the United States, as a means of protecting tribal political autonomy and tribal sovereignty. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). This long-standing protection of tribal sovereignty was recognized by the Tenth Circuit in *Pan American Company v. Sycuan Band of Mission Indians*, 884 F.2d 416 (10th Cir. 1989). In *Santa Clara, supra*, the United States Supreme Court held that Indian tribes possessed common law immunity from suit, a waiver of which "cannot be implied but must be unequivocally expressed". 56 L.Ed.2d at 115, citing *United States v. Testan*, 424 U.S. 392, 399, 47 L.Ed.2d 114, 96

S.Ct. 948 (1976), quoting *United States v. King*, 395 U.S. 1, 4, 23 L.Ed.2d 52, 89 S.Ct. 1501 (1969).

In the present case, not only was there no express waiver of tribal immunity, i.e. the Letter of Understanding, but the Guaranty Agreement expressly reserved the Tribe's right to assert this immunity. Nevertheless, the plaintiff is attempting to subject the Tribe to the jurisdiction of the District Court in the absence of an express waiver of sovereign immunity.

The Tribe is Immune from Suite Because Tribal Immunity was not Clearly Waived in the Guaranty Agreement of the Letter of Understanding. The express waiver rule, first introduced in *Santa Clara Pueblo, supra*, was applied by the Tenth Circuit in the case of *Ramey Construction Company v. The Apache Tribe of Mescalero Reservation*, 673 F.2d 315 (10th Cir. 1982). In *Ramey, supra*, the Apache Tribe contracted with Ramey Construction for the purpose of building a resort hotel complex on reservation property. After the project was completed, Ramey filed a complaint in United States District Court seeking to recover approximately \$427,000 of contract retainage withheld by the tribe and in addition alleged that certain tribal defendants had breached their contract with Ramey. The district court found it had jurisdiction over the tribal defendants.

On appeal, the Tenth Circuit reconsidered the jurisdictional issue. Below, Ramey had alleged that the tribal defendants had waived their sovereign immunity by one or all of the following actions: (1) agreeing to an

attorney's fee clause in the contract; (2) entering into a loan agreement with the Bank of New Mexico obligating the tribe to "duly pay and discharge . . . all claims of any kind . . ."; (3) submitting a certificate to the United States Economic Development Agency stating that the contract documents "constitute valid and legally binding obligations upon the parties . . ."; (4) obtaining payment and performance bonds from a surety; (5) consenting to partial summary judgment with respect to the contract retainage; and (6) including a "sue or be sued" clause in its tribal corporate charter.

In addressing each of Ramey's allegations of waiver, the Tenth Circuit first noted it is well-settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. 673 F.2d at 319, citing *Santa Clara Pueblo, supra*. The court then summarily dismissed the first four claims of waiver as "simply attempts by Ramey to imply a waiver when no express waiver exists". 673 F.2d at 319. The Tenth Circuit observed that there was no evidence the tribe had expressly waived its sovereign immunity in any of the documents as Ramey claimed. 673 F.2d at 319.

Similarly, the *Ramey* court refused to hold that the tribe's consent to entry of partial summary judgment on the retainage claim was a waiver of immunity with respect to Ramey's other claims, enforcing the rule that "waiver of sovereign immunity is to be strictly construed". 673 F.2d at 320. Finally, the court held that the presence of a "sue and be sued" clause in the tribal corporate charter was

insufficient to constitute a waiver of sovereign immunity.¹ See also *Seneca-Cayuga Tribe v. State Ex. Rel. Thompson*, 874 F.2d 709 (10th Cir. 1989) ("while tribal sovereign immunity is not absolute, waivers of sovereign immunity are strictly construed") citing, *Ramey, supra*, at 320.

The result in *Ramey, supra*, should control in this case in that Ramey's second claim of waiver was the tribe's execution of a loan agreement with the Bank of New Mexico, a claim summarily rejected by the Tenth Circuit. This agreement has no more persuasive value in the present case than it did in *Ramey, supra*.

The issue of waiver in contract actions was addressed in depth in the case of *American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985), a case in which the Standing Rock Tribe had entered into a loan agreement with the plaintiff obligating the tribe to repay \$80,000 over seven years with 1% annual interest. The promissory note provided the plaintiff with remedies against Standing Rock upon default, including the right to charge interest and in addition "such other and further rights and remedies provided by law". 780 F.2d at 1376. The promissory note also provided for reimbursement of attorney's fees incurred in collection efforts and also stated that the rights and obligations under it would be "subject to the law of the District of Columbia". 780 F.2d at 1376. However, the note expressly did not

¹The effect of a "sue or be sued" clause in a tribal corporate charter is discussed further at p. 13, *infra*.

speak to Standing Rock's consent to suit or to waiver of immunity.

Standing Rock subsequently defaulted and the plaintiff brought action seeking recovery on the loan. Standing Rock responded with a motion to dismiss asserting the action was an unconsented suit barred by tribal sovereign immunity. The district court denied the motion on the basis that application of the express waiver standard would restrict a tribe's ability to enter into commercial dealing with outsiders and in some cases unjustly deprive outsiders of the benefit for which they lawfully contracted. The district court then determined that Standing Rock's sovereign immunity should be deemed waived if Standing Rock had "clearly and unequivocally indicated" its willingness to expose itself to suit on the note. In effect, the district court was holding that simply because the tribe had executed the note, it was consenting to be sued in the event of default.

On appeal, the Eighth Circuit reiterated the principle announced by the Supreme Court in *Santa Clara Pueblo, supra*, that Indian nations possess the common law immunity from suit traditionally enjoyed by sovereign powers and this immunity cannot be waived by implication but must be "unequivocally expressed". 436 U.S. at 58-59, 98 S.Ct. at 1677. On this basis, the reasoning of the district court was rejected by the appeals court even though it acknowledged that from the circumstances an implication could be made that sovereign immunity was waived. Nevertheless, the court concluded "waiver by implication" would be "directly counter to the rule of *Santa Clara Pueblo* and the body of cases on which it is based". 780 F.2d at 1374.

In so holding, the court refused to adopt the district court's reasoning that an implied waiver in contract cases would not create a wide-spread threat to tribal autonomy. The court noted that Indian tribes long have structured their commercial dealings upon the justified expectation that absent an express waiver their sovereign immunity will stand fast. According to the court, "relaxation of the settled standard invites a challenge to virtually every activity undertaken by a tribe on the basis that the tribal immunity had been implicitly waived". 780 F.2d at 1378. The Eighth Circuit then quoted with approval the following observation from the Fifth Circuit that "to construe the immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the very purpose of congress in not relaxing the immunity, namely the protection of the interests and the property of tribes . . .". 780 F.2d at 1378, quoting, *Maryland Casualty Company v. Citizens National Bank*, 361 F.2d 517, 521-22 (5th Cir.) cert. den., 385 U.S. 918, 87 S.Ct. 227, 171 L.Ed.2d 143 (1966).

Neither did the *Standing Rock* court give credence to the district court's concern that the express waiver standard would impair a tribe's ability to conduct business. The court dismissed this concern on the basis that tribes and persons dealing with them have long known how to waive sovereign immunity when they so wish. 780 F.2d at 1379. Finally, the court dismissed the district court's observation that the express waiver standard can unfairly deprive contracting parties of the benefit of their bargains. As argued by the plaintiff, the tribe had "welshed" on its loan with the consortium and was not attempting to hide under the blanket of tribal immunity. Nevertheless, as noted by the Eighth

Circuit, if an injustice had been worked, it was not the rigid express waiver standard which should bear the blame, but the doctrine of sovereign immunity itself. Based on *Santa Clara Pueblo*, *supra*, and its lineage, the court was compelled to conclude that "nothing short of an express and unequivocal waiver can defeat the sovereign immunity of an Indian nation". 780 F.2d at 1379.

Jurisdiction was also found lacking in the case of *Pan American Company v. Sycuan*, *supra*, a case where the parties had entered into a federally approved bingo agreement authorizing Pan Am to operate bingo games on the reservation. Subsequently Pan Am brought a breach of contract action against the tribe in federal district court. The tribe filed a motion to dismiss for lack of jurisdiction which was granted by the trial court. In assessing whether the tribe had waived its immunity to suit, the Ninth Circuit again reviewed the law as established in *Santa Clara Pueblo*, *supra*, and acknowledge the existing rule that absent congressional or tribal consent to suit, state and federal courts have no jurisdiction over Indian tribes; only consent gives the courts the jurisdictional authority to adjudicate claims raised by or against tribal defendants.

The court then addressed Pan Am's claim that the bingo agreement's arbitration clause was sufficient to constitute a waiver of tribal sovereign immunity. Specifically, Pan Am pointed to the provision in the agreement which provided that:

In the event a dispute arises between its parties . . . either party may seek arbitration

of said dispute and both parties to hereby subject themselves to the jurisdiction of the American Arbitration Association and do agree to be bound by and comply with its rules and regulations as promulgated from time to time.

884 F.2d at 416. Pan Am argued that the tribe's consent to submit to arbitration was also a submission to judicial jurisdiction as a matter of definition. The Ninth Circuit rejected this argument noting that the bingo agreement's arbitration clause did not contain the unequivocal expression of tribal consent to suit necessary to effect a waiver of the tribe's sovereign immunity. The court noted that absent an affirmative textual waiver in the terms of the contractual agreement or tribal constitution, federal courts have consistently declined to find tribal consent to federal jurisdiction. 884 F.2d at 419.

Pan Am nevertheless argued that not to imply a waiver would be to create a trap for the unsuspecting and leave Pan Am without judicially enforceable remedies for the tribe's alleged breach of contract. The court rejected this emotional argument on the basis that "Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation." 884 F.2d at 419. The court again reiterated that consent by implication, whatever its justification, still defeats the clear mandate of *Santa Clara Pueblo*, *supra*.

No matter what the circumstances, the courts of this nation have consistently adhered to the rule that an Indian tribe is immune to a suit for damages unless that immunity has been expressly and unequivocally waived. In the case of *McClendon v. U.S.*, 885 F.2d 627 (9th Cir. 1989), the fact that the tribe had entered into a lease agreement or participated in settlement of a lawsuit out of which the lease agreement arose was insufficient to waive sovereign immunity since neither the judgment nor the resulting lease contained an express waiver of sovereign immunity. In that case, the court noted that "tribes and persons dealing with them long have known how to waive sovereign immunity when they so wish". 885 F.2d at 627, quoting *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, *supra* at 1379.

In *McClendon*, *supra*, the court justified its finding that jurisdiction was lacking partially on the basis that McClendon could have negotiated a term in the lease agreement governing consent to suit. Given that courts have consistently required express and unequivocal waiver of sovereign immunity, if McClendon failed to negotiate such a waiver, considerations of equity were not in his favor. 885 F.2d at 632.

In the present case, not only was there not an express or implied waiver of immunity by the Tribe in the Letter of Understanding, but the Guaranty Agreement itself expressly reserved the Tribe's right to assert its sovereign immunity to suit.

PROPOSITION II

SERVICE OF PROCESS IN INDIAN COUNTRY BY A DEPUTY SHERIFF OF CADDO COUNTY DOES NOT CONFER JURISDICTION ON THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA.

Even though tribal land surrounding the Kiowa Complex in Carnegie, Oklahoma, is held in trust by the United States of America, this geographic area is outside the jurisdiction of the State of Oklahoma.

For this reason, service of process in a civil action by a state officer in Indian Country is unlawful and does not confer jurisdiction on the District Court of Oklahoma County. 18 U.S.C. § 1151. *State v. Littlechief*, Okl.Cr., 573 P.2d 263, 264 through 265 [1978]. A copy of summons and the return in question is attached.

CONCLUSION

In cases where an individual or other entity attempts to initiate an action against an Indian tribe and the tribe has not expressly waived its sovereign immunity to suit, the trial court has no jurisdiction over the tribe and the action must be dismissed. In the present case, not only has the Tribe not waived its sovereign immunity, but the Guaranty Agreement contains an explicit reservation of the Tribe's right to assert its sovereign immunity. Under these circumstances, the

Tribe is immune from an action to enforce both the letter of Understanding and Guaranty Agreement regardless of any inequities which may result. As noted by several courts, individuals or companies who deal with Indian tribes and the tribes themselves are fully aware of the tribe's right to immunity and the ways in which the tribe may waive this immunity.

Respectfully submitted,

S/Jim Merz

JIM MERZ, OBA #6152
JOHN STACY, OBA #8531
1330 N. Classen Blvd., Ste 301
Oklahoma City, Ok 73106
(405) 235-2226

ATTORNEYS FOR
DEFENDANT

JA-30

CERTIFICATE OF MAILING

This is to certify that on this 15th day of September, 1993, the above and foregoing instrument was mailed, postage prepaid, to:

John Patterson, Jr.
525 Central Park Drive, Suite 201
Oklahoma City, Oklahoma 73105

ATTORNEY FOR PLAINTIFF

S/Jim Merz
Jim Merz

JA-31

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING)	
TECHNOLOGIES, INC.,)	
)	
Plaintiff,)	
)	
v.)	No. CJ-93-6523-64
)	
KIOWA TRIBE OF)	
OKLAHOMA,)	
)	
Defendant.)	

RESPONSE OF PLAINTIFF TO
DEFENDANT'S MOTION TO DISMISS

Plaintiff, in response to Defendant's Motion to Dismiss denies that the claimed immunity from suit is applicable in the instant case and that service on defendant on tribal lands is improper.

PROPOSITION I

INDIAN TRIBAL IMMUNITY FROM SUIT
DOES NOT APPLY TO ACTIONS
INVOLVING ECONOMIC DEVELOPMENT
OFF RESERVATION

Defendant asserts that an Indian tribe is immune to suit, citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 98, 98 S.Ct. 1670, 56 L. Ed.2d 106. *Santa Clara Pueblo* follows a line of cases which affirm tribal immunity from lawsuit in certain limited areas. Those cases generally provide that immunity exists where tribal self government and tribal ventures conducted on tribal land are involved.

Indian Tribal sovereignty is not absolute and unchanging. Mr. Justice Frankfurter reviewed the evolution of retention of Federal power over indian lands in a case involving state regulation of off reservation fishing rights of indian tribal members in *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L. Ed.2d 573. His Opinion states:

As the United States spread westward, it became evident that there was no place where the Indians could be forever isolated. In recognition of this fact the United States began to consider the Indians less as foreign nations and more as a part of our country . . .

The general notion drawn from Chief Justice Marshall's opinion in *Worcester v.*

Georgia (US) 6 Pet 515, 561, 8 L Ed 483, 501; . . . that an Indian reservation is a distinct nation within those boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. By 1880 the Court no longer viewed reservations a distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law . . .

Concurrently the influence of state law increased rather than decreased . . .

During the 1940's several States were permitted to assert criminal jurisdiction.

In 1953 Congress granted to several States full civil and criminal jurisdiction over Indian reservations . . .

The applicability of state law, we there said, (*Williams v. Lee*, 358 U.S. 217, 795 ct. 269, 3 L Ed 2d 251) depends upon "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them," 358 US, at 220 . . .

But State regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams v. Lee*.

The Supreme Court recognized the right of a State to tax the revenues from a commercial venture conducted off reservation, considering the impact of the Indian Reorganization Act of 1934 in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 36 L. Ed.2d 114, 93 S. Ct. 1267. The Court says:

But tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities . . . not on any reservation." *Organized Village of Kake*, supra, at 75, 7 L Ed 2d 573. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. See, e.g., *Puyallup Tribe v. Department of Game*, 391 US 392, 398, 20 L Ed 2d 689, 88 S Ct 1725 (1968); *Organized Village of Kake*, supra, at 75-76, 7 L Ed 2d 573; *Tulee v. Washington*, 315 US 681, 683, 86 L Ed 1115, 62 S Ct 862 (1942); *Shaw v. Gibson-Zahniser Oil Corp.*, 276 US 575, 72 L Ed 709, 48 S Ct 333 (1928); *Ward v. Race Horse*, 163 US 504, 41 L Ed 244, 16 S Ct

1076 (1896). That principal is as relevant to a State's tax laws as it is to state criminal laws, see *Ward v. Race Horse*, supra, at 516, 41 L Ed 244, and applies as much to tribal ski resorts as it does to fishing enterprises. See *Organized Village of Kake*, supra.

* * * *

The Indian Reorganization Act of 1934 neither requires nor counsels us to recognize this tribal business venture as a federal instrumentality. Congress itself felt it necessary to address the immunity question and to provide tax immunity to the extent it deemed desirable. There is, therefore, no statutory invitation to consider projects undertaken pursuant to the Act as federal instrumentalities generally and automatically immune from state taxation. Unquestionably, the Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment. It gave the Secretary of Interior power to create new reservations, and tribes were encouraged to revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations, with power to conduct the business and economic affairs of the tribe. As was true in the case before us, a tribe taking advantage of the Act might generate

substantial revenues for the education and the social and economic welfare of its people. So viewed, an enterprise such as the ski resort in this case serves a federal function with respect to the Government's role in Indian Affairs. But the "mere facts that property is used, among others, by the United States as an instrument for effecting its purpose does not relieve it from state taxation. "Choctaw, Oklahoma & Gulf R. Co. v. Mackey, 256 US 531, 536, 65 L Ed 1076, 41 S Ct 582 (1921) (other citations omitted).

The intent and purpose of the Reorganization Act was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by the century of oppression and paternalism." . . . The Reorganization Act did not strip Indian tribes of their reservation lands and their historic immunity from state and local control. But, in the context of the Reorganization Act, we think it unrealistic to conclude that Congress conceived of off-reservation tribal enterprises "virtually as an arm of the Government" . . . On the contrary, the aim was to disentangle the tribes from the official bureaucracy. The Court's decision in *Organized Village of Kake*, supra, which involved tribes organized under the Reorganization Act, demonstrates that off-

reservation activities are within the reach of state law. . . .

"This Court has repeatedly said that tax exemptions are not granted by implication It has applied that rule to taxing acts affecting Indians as to all others. . . . If congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences." *Oklahoma Tax Comm'n v. United States*, 319 US, at 606-607, 87 L Ed 1612 Here, the rights and land were acquired by the Tribe beyond its reservation borders for the purpose of carrying on a business enterprise as anticipated by §476 and 477 of the Act. (citations omitted) These provisions are designed to encourage tribal enterprises "to enter the white world on a footing of equal competition." . . . In this context, we will not imply an expansive immunity from ordinary income taxes that businesses throughout the State are subject to. We therefore hold that the exemption in §465 does not encompass or bar the collection of New Mexico's nondiscriminatory Gross Receipts Tax and that Tribe's ski resort is subject to that tax. . . ."

Congress has authorized the Tribes to organize two separate entities, a political governing body to exercise pre-existing powers to self-government pursuant to §16 of the Act of June 18, 1934 (48 Stat. 987) and a tribal corporation to engage in business transactions pursuant to §17. 25 U.S.C. §473 provides that the provisions of §476 and §477 (Sections 16 and 17 of the Act) shall not apply to the Kiowa Tribe in the State of Oklahoma. In 1970 the Kiowa Tribe of Oklahoma enacted a constitution of by-laws which provided for economic development and authorized the tribe to contract relating thereto.

The Kiowa Tribe entered into an agreement to purchase the capital stock of Clinton Sherman Aviation, Inc., from defendants, and gave in consideration its promissory note. This transaction was a commercial venture and did not relate to tribal lands or ventures conducted on tribal lands. Plaintiff submits that the defendant is subject to "non-discriminatory state law otherwise applicable to all citizens of the state. *Mescalero Apache Tribe, supra*.

Justice Steven, especially concurring in *Oklahoma Tax Commission v. Citizen band Potawatomi Indian Tribe of Oklahoma*, 111 S.Ct. 905 (1991) says:

. . . I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory, cf. 28 U.S.C. § 1605(a) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... (2) in

which the action is based upon a commercial activity carried on in the United States by a foreign state....")

The New Mexico Supreme Court has so held in *Pueblo of Acoma v. Padilla*, 754 P.2d 845 (N.M. 198). In that case the New Mexico Supreme Court held that the Pueblo was not immune from suit by a contractor for work done on an off-reservation location. Certiorari was denied in *Pueblo of Acoma v. Padilla*, 109 S. Ct. 1767.

It is clear that the State of Oklahoma has jurisdiction over the indian tribe and over the subject matter of the action. There is no need for an express waiver of immunity from suit when the Tribe engages in an off-reservation commercial venture.

PROPOSITION II

SERVICE OF THE SUMMONS IS VALID

Defendant attacks the sufficiency of service for the reason that the petition and summons were served at the Tribal Complex, property which is held in trust by the United States of America for the benefit of the Kiowa Tribe, citing *State v. Littlechief*, 573 P.2d 263 (Okl. 1978). That case has to do with the jurisdiction of the State of Oklahoma to prosecute a homicide which occurred on Indian Land.

The issue of service of process was not present in the case.

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LeClair v. Powers, 632 P.2d 370 (Okla. 1981) held service of process in Indian land proper, citing the following language from *Bad Horse v. Bad Horse*, 517 P.2d 893 (Mont. 1974):

"Once the district court has assumed jurisdiction over the subject matter and process has been properly served, the defendant cannot throw up a shield around herself by claiming that the State process server cannot pierce the exterior boundaries of an Indian Reservation and serve civil process therein."

If the district court has jurisdiction in this matter, it cannot be argued that service is improper.

S/John E. Patterson, Jr.

John E. Patterson, Jr. OBA 6953
5555 N. Grand Blvd., Ste 210
Oklahoma City, OK 73112
(405) 947-1985

ATTORNEY FOR PLAINTIFF

JA-41

CERTIFICATE OF SERVICE

This is to certify that on the 1st day of October, 1993, a true and correct copy of the above and foregoing instrument was mailed by first-class mail, postage prepaid, to:

Jim Merz
Merz and Stacy
1330 Classen Blvd., Ste. 301
Oklahoma City, OK 73106
Attorney for Defendant

S/John E. Patterson

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING)	
TECHNOLOGIES, INC.,)	
an Oklahoma Corporation,)	
)	
Plaintiff,)	
)	
v.)	No. CJ-93-6523-64
)	
KIOWA TRIBE OF)	
OKLAHOMA,)	
)	
Defendant.)	

PETITION ON A PROMISSORY NOTE

Plaintiff, for cause of action against the Defendant, alleges and states as follows:

1. Defendant agreed to purchase capital stock of Clinton-Sherman Aviation, Inc. from Plaintiff by Letter of Agreement dated March 19, 1990. As part of said transaction Plaintiff agreed to loan Defendant the sum of \$285,000.00 to enable Defendant to complete the said purchase.

2. On April 3, 1990, Defendant executed and delivered to Plaintiff in Oklahoma City, a Promissory Note in the principal sum of \$285,000.00, evidencing the said loan, a copy of which is attached hereto and marked Exhibit "A". Payments thereunder were to be made to Plaintiff at its address in Oklahoma City, Oklahoma.

3. Defendant has defaulted in payment of the Note and owes Plaintiff the full amount of principal and interest provided for therein.

WHEREFORE Plaintiff prays for judgment against Defendant, Kiowa Tribe of Oklahoma, in the sum of \$285,000.00 with interest thereon as specified in the Note, costs and attorney fees.

S/John E. Patterson, Jr.

JOHN E. PATTERSON, JR., OBA #6953
525 Central Park Drive, Suite 201
Oklahoma City, Oklahoma 73105
Telephone No. (405) 525-5241
Fax No. (405) 525-5256

Attorney for Plaintiff

PROMISSORY NOTE

\$285,000.00

April 8, 1990
Carnegie, Oklahoma

FOR VALUE RECEIVED, the undersigned Kiowa Tribe of Oklahoma ("Maker"), agrees to the terms of this Note and promises to pay to the order of Manufacturing Technologies, Inc. ("Lender") at 3212 East Interstate 240, Oklahoma City, Oklahoma 73135, or at such other place as may be designated in writing by the holder of this Note, the principal sum of Two Hundred Eighty-Five Thousand and no/100 Dollars (\$285,000.00), together with interest thereon at the rate of 10% per annum, payable \$47,500 30 days from the date of this Note, with the balance in full as to both principal and interest ninety days from the date of this note. Any principal or interest amount not paid when due shall bear interest until paid at a rate of 5% per annum greater than the per annum interest rate prevailing at the time the unpaid amount became due, but in no event at a rate less than 15% per annum or at an interest rate either before or after Maturity which is greater than permitted by law. Interest on this Note is calculated on the actual number of day elapsed on a basis of a 360 day year unless otherwise indicated above. For purposes of computing interest on this Note, payments of all or any portion of the Principal Amount will not be deemed to have been made until such payments are received by holder in collected funds.

ALL PARTIES PRINCIPAL. All parties liable for payment hereunder shall each be regarded as a principal and each party agrees that any party hereto with approval of

holder and without notice to other parties may from time to time renew this Note or consent to one or more extensions or deferrals of Maturity Date for any term or terms, and all parties shall be liable in some manner as on original note. All parties liable for payment hereunder waive presentment, notice of dishonor and protest and consent to partial payments, substitutions or release of collateral and to addition or release of any party or guarantor.

ADVANCES AND PAYMENT. It is agreed that the sum of all advances under this Note may exceed the Principal Amount as shown above, but the unpaid balance shall never exceed said Principal Amount. Advances and payments on Note shall be recorded on records of Lender and such records shall be prima facie evidence of such advances, payments and unpaid principal balance. Subsequent advances and the procedures described herein shall not be construed or interpreted as granting a continuing line of credit for Principal Amount. Lender reserves the right to apply any payment by Maker, or for account of Maker, toward this Note or any other obligation of Maker to Lender.

COLLATERAL. This Note and all other obligations of Maker to Lender, and all renewals or extensions thereof, are secured by all collateral securing this Note and by all other security interests heretofore or hereafter granted to Lender as more specifically described in Security Agreements and other securing documentation.

ACCELERATION. At option of holder, the unpaid balance of this Note and all other obligations of Maker to

holder, whether direct or indirect, absolute or contingent, now existing or hereafter arising, shall become immediately due and payable without notice or demand upon the occurrence or existence of any of following events or conditions: (a) Any payment required by this Note or by any other note or obligation of Maker to holder or to others is not made when due or the occurrence or existence of any event which results in acceleration of the maturity of any obligation of Maker to holder or to others under any promissory note, agreement or undertaking; (b) Maker defaults in performance of any covenant, obligation, warranty or provision contained in any loan agreement or in any instrument or document securing or relating to this Note or any other note or obligation of Maker to holder or to others; (c) Any warranty, representation, financial information or statement made or furnished to Lender by or in behalf of Maker proves to have been false in any material respect when made or furnished; (d) The making of any levy against or seizure, garnishment or attachment of any collateral; (e) Any time Lender in good faith believes prospect of payment of this Note is impaired; (f) When in the judgment of Lender the collateral, if any, becomes unsatisfactory or insufficient either in character or value, and upon request, Maker fails to provide additional collateral as required by Lender; (g) Loss, theft, substantial damage or destruction of collateral, if any; (h) Death, dissolution, change in management or termination of existence of any Maker; or (i) Appointment of a receiver over any part of the property of any Maker, the assignment of property by any Maker for the benefit of creditors, or the commencement of any proceedings under any bankruptcy or insolvency laws by or against any party liable, directly or indirectly, hereunder.

WAIVERS AND GOVERNING LAW. No waiver by holder of any payment or other right under this Note or any related agreement or documentation shall operate as a waiver of any other payment or right. Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma.

COLLECTION COSTS. All parties liable for payment hereunder agree to pay reasonable costs of collection, including an attorney's fee of a minimum of 15% of all sums due upon default.

RIGHT OF OFFSET. Any indebtedness due from holder hereof to Maker or any party hereto including, but without limitation, any deposits or credit balances due from holder, is pledged to secure payment of this Note and any other obligations to holder of Maker or any party hereto, and may at any time while the whole or any part of such obligation remains unpaid, either before or after Maturity hereof, be appropriated, held or applied toward the payment of this Note or any other obligation to holder of Maker or any party hereto.

IN WITNESS WHEREOF, the Maker has executed this Note on the date first above written.

Kiowa Tribe of Oklahoma

S/I.T. Goombi

J. T. Goombi, Chairman

Carnegie, Oklahoma 73015

JA-48

IN THE DISTRICT COURT OF OKLAHOMA
COUNTY, STATE OF OKLAHOMA

MANUFACTURING
TECHNOLOGIES

Plaintiff(s)

JOHN PATTERSON

Attorney(s) for Plaintiff(s)

-vs-

Case No. CJ-93-6523-64

KIOWA TRIBE OF
OKLA.

Defendant(s)

JIM MERZ

Attorney(s) for Defendant(s)

ORDER
COURT MINUTE

Date: 9/21/94 Judge _____

Hearing On: Motion to Dismiss

Ruling By Court:

*Overruled - Tribal immunity does not extend
to going away from the reservation and engaging in business
ventures. Defendant granted 20 days to answer.*

S/Leamon Freeman

JA-49

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

MANUFACTURING)
TECHNOLOGIES, INC.,)

Plaintiff,)

v.)

No. CJ-93-6523-64

KIOWA TRIBE OF)
OKLAHOMA,)

Defendant.)

ANSWER OF DEFENDANT
KIOWA TRIBE OF OKLAHOMA

Defendant, for Answer herein alleges:

1. Defendant is without information sufficient to form a belief as to the truth of the allegations of paragraph 1 of the petition and hence denies the same. Upon information and belief, defendant alleges that Plaintiff dealt with an entity known as Kiowa Industrial Development Commission and not Defendant.

2. Defendant is without information sufficient to form a belief as to the truth of the allegations of paragraph

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2 of the petition and hence denies the same. Upon information and belief, defendant alleges that Plaintiff dealt with an entity known as Kiowa Industrial Development Commission and not Defendant.

3. Defendant is without information sufficient to form a belief as to the truth of the allegations of paragraph 3 of the petition and hence denies the same. Upon information and belief, defendant alleges that Plaintiff dealt with an entity known as Kiowa Industrial Development Commission and not Defendant.

AFFIRMATIVE DEFENSES

Defendant is a federally recognized Indian Tribe and, as such, is immune to suit in the District Court of Oklahoma County, Oklahoma, in the absence of a waiver of such immunity.

WHEREFORE, having fully answered, Defendant prays that defendant take nothing and that it have and recover its costs herein.

JA-51

S/R. Brown Wallace

R. Brown Wallace, OBA #9310
ANDREWS DAVIS LEGG BIXLER
MILSTEN & PRICE
500 West Main
Oklahoma City, Oklahoma 73102

Telephone (405) 272-9241

ATTORNEY FOR
KIOWA TRIBE OF OKLAHOMA

CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of October, 1994, a true and correct copy of the above and foregoing document was placed in the United States Mail, postage prepaid and addressed to:

John E. Patterson, Jr.
5555 N. Grand Blvd, Ste. 210
Oklahoma City, Oklahoma 73112

S/R. Brown Wallace

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING TECHNOLOGIES,)	
INC., an Oklahoma Corporation,)	
)
Plaintiff,)	
)
v.)	No. CJ-93-6523
)
KIOWA TRIBE OF OKLAHOMA,)	
)
Defendant.)	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 13 for the District Courts of Oklahoma, the Plaintiff, Manufacturing Technologies, Inc., an Oklahoma Corporation (hereinafter referred to as "Plaintiff"), moves for Summary Judgment in its favor and against the Defendant, Kiowa Tribe of Oklahoma (hereinafter referred to as "Defendant"), on the grounds that the pleadings, exhibits on file, and the attached Affidavit of Gordon Pulliam, Officer of Manufacturing Technologies, Inc., an Oklahoma Corporation, show that there is no substantial controversy as to any material fact, and the Plaintiff is therefore entitled, as a matter of law, to Summary Judgment against said Defendant. In support of its Motion for Summary Judgment, the Plaintiff submits the following:

BRIEF IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT
UNDISPUTED FACTS

1. On April 3, 1990, Defendant for good and valuable consideration, made, executed and delivered to the Plaintiff, and which Plaintiff now holds, a certain promissory note in writing of that date, whereby the Defendant promised to pay said Plaintiff the principal sum of \$285,000.00, together with interest thereon and as set forth therein. A true and correct copy of said note is attached to Plaintiff's Petition, marked as Exhibit "A" and incorporated by reference herein. The Defendant has failed to pay said note in accordance with its terms thereof and is in default.

2. The amounts on said promissory note are \$285,000.00 principal, with \$140,718.75 accrued but unpaid interest, interest at the rate of 15% per annum from September 24, 1993, together with attorney fees and costs.

3. The Defendant has failed to assert any valid affirmative defense.

4. The above facts are testified to by Gordon Pulliam, as an Officer of said Plaintiff, as set forth in an Affidavit attached hereto as Exhibit "B" and incorporated by reference herein.

ARGUMENTS AND AUTHORITIES
PROPOSITION I

SUMMARY JUDGMENT SHOULD BE
GRANTED WHERE FACTS ARE NOT
CONTROVERTED.

Summary Judgment should be granted where the facts set forth in the pleadings, exhibits attached to the Petition and Affidavit which Plaintiff submits in support of its Motion for Summary Judgment, show that there is no substantial conflict as to any material fact and that the Movant is entitled to judgment as a matter of law. Rule 13 of the Rules for the District Courts of Oklahoma. *RST Service Manufacturing, Inc. v. Taylor Musselwhite, d/b/a Argus Tank & Fabrication Company*, 628 P. 2d. 366 (Okla. 1981).

PROPOSITION II

PLAINTIFF IS ENTITLED TO JUDGMENT
ON A NOTE WHEN NO DEFENSE IS
SHOWN

With respect to a signature upon a note, 12 O.S. Section 3-307 provides that:

- (1) Unless specifically denied in the pleadings, each signature on an instrument is admitted. When the effectiveness of a signature is put in issue (a) the burden of establishing it is on the

party claiming under the signature; but (b) the signature is presumed to be genuine or authorized.

- (2) When signatures are admitted or established, production of the instrument entitles the holder to recover thereon unless the Defendant establishes a defense.

The Defendants have failed to plead any affirmative defense in this case. The law of Oklahoma is clear that the Court has no choice but to rule that when the respective parties' signatures are admitted on the note, the Plaintiff is entitled to recover thereon upon production unless a real affirmative defense is established. See *Persson v. McCormisk*, 412 P.2d 619 (Okla. 1966) and *The Prudential Insurance Company of America, a corporation, vs. W.C. Bonney and Clara Lee Bonney, husband and wife, and Wilma G. Bonney*, 299 F.Supp. 790 (W.D.Okla. 1969). See also, *RST Service Manufacturing, Inc. vs. Taylor Muselwhite, d/b/a Argus Tank & Fabrication Company*, 628 P.2d 366 (Okla. 1981).

WHEREFORE, it is respectfully prayed that this Court render Summary Judgment in favor of the Plaintiff and against the Defendant, as prayed for in its Petition, and to grant such other and further relief as the law and equity may warrant.

JA-56

Respectfully submitted,

S/John E. Patterson, Jr.

John E. Patterson, Jr., OBA #6953
Two Corporate Plaza
5555 N. Grand Blvd., Suite 210
Oklahoma City, OK 73112
(405) 947-1985

Attorney for Plaintiff

HEARING ON MOTION

Hearing on this Motion shall be before Judge Leamon Freeman on September 29, 1995, at 9:00 o'clock a.m., in the Oklahoma County Courthouse.

JA-57

CERTIFICATE OF MAILING

I certify that a true and correct copy of the above and foregoing document was mailed, on the 6th day of September, 1995, U.S. Mail, postage prepaid to the following:

R. Brown Wallace
Andrews, Davis, Legg, Bixler
Milsten & Price
500 W. Main
Oklahoma City, OK 73102

S/John E. Patterson

John E. Patterson

PROMISSORY NOTE

\$285,000.00

April 8, 1990
Carnegie, Oklahoma

FOR VALUE RECEIVED, the undersigned Kiowa Tribe of Oklahoma ("Maker"), agrees to the terms of this Note and promises to pay to the order of Manufacturing Technologies, Inc. ("Lender") at 3212 East Interstate 240, Oklahoma City, Oklahoma 73135, or at such other place as may be designated in writing by the holder of this Note, the principal sum of Two Hundred Eighty-Five Thousand and no/100 Dollars (\$285,000.00), together with interest thereon at the rate of 10% per annum, payable \$47,500 30 days from the date of this Note, with the balance in full as to both principal and interest ninety days from the date of this note. Any principal or interest amount not paid when due shall bear interest until paid at a rate of 5% per annum greater than the per annum interest rate prevailing at the time the unpaid amount became due, but in no event at a rate less than 15% per annum or at an interest rate either before or after Maturity which is greater than permitted by law. Interest on this Note is calculated on the actual number of day elapsed on a basis of a 360 day year unless otherwise indicated above. For purposes of computing interest on this Note, payments of all or any portion of the Principal Amount will not be deemed to have been made until such payments are received by holder in collected funds.

ALL PARTIES PRINCIPAL. All parties liable for payment hereunder shall each be regarded as a principal and each party agrees that any party hereto with approval of

holder and without notice to other parties may from time to time renew this Note or consent to one or more extensions or deferrals of Maturity Date for any term or terms, and all parties shall be liable in some manner as on original note. All parties liable for payment hereunder waive presentment, notice of dishonor and protest and consent to partial payments, substitutions or release of collateral and to addition or release of any party or guarantor.

ADVANCES AND PAYMENT. It is agreed that the sum of all advances under this Note may exceed the Principal Amount as shown above, but the unpaid balance shall never exceed said Principal Amount. Advances and payments on Note shall be recorded on records of Lender and such records shall be prima facie evidence of such advances, payments and unpaid principal balance. Subsequent advances and the procedures described herein shall not be construed or interpreted as granting a continuing line of credit for Principal Amount. Lender reserves the right to apply any payment by Maker, or for account of Maker, toward this Note or any other obligation of Maker to Lender.

COLLATERAL. This Note and all other obligations of Maker to Lender, and all renewals or extensions thereof, are secured by all collateral securing this Note and by all other security interests heretofore or hereafter granted to Lender as more specifically described in Security Agreements and other securing documentation.

ACCELERATION. At option of holder, the unpaid balance of this Note and all other obligations of Maker to

holder, whether direct or indirect, absolute or contingent, now existing or hereafter arising, shall become immediately due and payable without notice or demand upon the occurrence or existence of any of following events or conditions: (a) Any payment required by this Note or by any other note or obligation of Maker to holder or to others is not made when due or the occurrence or existence of any event which results in acceleration of the maturity of any obligation of Maker to holder or to others under any promissory note, agreement or undertaking; (b) Maker defaults in performance of any covenant, obligation, warranty or provision contained in any loan agreement or in any instrument or document securing or relating to this Note or any other note or obligation of Maker to holder or to others; (c) Any warranty, representation, financial information or statement made or furnished to Lender by or in behalf of Maker proves to have been false in any material respect when made or furnished; (d) The making of any levy against or seizure, garnishment or attachment of any collateral; (e) Any time Lender in good faith believes prospect of payment of this Note is impaired; (f) When in the judgment of Lender the collateral, if any, becomes unsatisfactory or insufficient either in character or value, and upon request, Maker fails to provide additional collateral as required by Lender; (g) Loss, theft, substantial damage or destruction of collateral, if any; (h) Death, dissolution, change in management or termination of existence of any Maker; or (i) Appointment of a receiver over any part of the property of any Maker, the assignment of property by any Maker for the benefit of creditors, or the commencement of any proceedings under any bankruptcy or insolvency laws by or against any party liable, directly or indirectly, hereunder.

WAIVERS AND GOVERNING LAW. No waiver by holder of any payment or other right under this Note or any related agreement or documentation shall operate as a waiver of any other payment or right. Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma.

COLLECTION COSTS. All parties liable for payment hereunder agree to pay reasonable costs of collection, including an attorney's fee of a minimum of 15% of all sums due upon default.

RIGHT OF OFFSET. Any indebtedness due from holder hereof to Maker or any party hereto including, but without limitation, any deposits or credit balances due from holder, is pledged to secure payment of this Note and any other obligations to holder of Maker or any party hereto, and may at any time while the whole or any part of such obligation remains unpaid, either before or after Maturity hereof, be appropriated, held or applied toward the payment of this Note or any other obligation to holder of Maker or any party hereto.

IN WITNESS WHEREOF, the Maker has executed this Note on the date first above written.

Kiowa Tribe of Oklahoma

S/I.T. Goombi

J. T. Goombi, Chairman
Carnegie, Oklahoma 73015

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING TECHNOLOGIES,)
 INC., an Oklahoma corporation,)

Plaintiff,)

v.)

)No. CJ-93-6523

KIOWA TRIBE OF OKLAHOMA,)

Defendant.)

AFFIDAVIT

STATE OF OKLAHOMA)

SS:

COUNTY OF OKLAHOMA)

The undersigned Affiant, of lawful age, being sworn upon oath, deposes and states:

1. That I am President of Manufacturing Technologies, Inc., an Oklahoma Corporation, (hereinafter referred as "Plaintiff"), the Plaintiff in the above captioned case. I have personally reviewed and examined the account file of Kiowa Tribe of Oklahoma (hereinafter referred to as "Defendant"). As President, I am qualified and authorized

to execute this Affidavit on behalf of Plaintiff on the basis of my personal knowledge.

2. Upon review of the aforementioned file, I do state for the record that Plaintiff is currently in possession of a certain promissory note dated April 3, 1990, executed by J.T. Goombi, Chairman of Kiowa Tribe of Oklahoma. I further state that a true and correct copy of the note is attached to Plaintiff's Petition and marked as Exhibit "A".

3. I further state that the note is in default by reason of failure of payment of all sums due and owing in accordance with its terms.

4. I further state that pursuant to the terms of the note sued upon, Plaintiff considers and has declared the Defendant to be responsible for and liable to the Plaintiff on the aforementioned note in the sum of \$285,000.00, with interest as specified in the note until paid, for all collection expenses, accrued and accruing, and for a reasonable attorney fee.

5. The undersigned has personal knowledge of the preceding facts which are admissible in evidence and can testify to the truth of said facts.

Further Affiant Saith Not.

 Gordon Pulliam

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STATE OF OKLAHOMA)
) ss
COUNTY OF OKLAHOMA)

Signed and sworn to before me on this ____ day of
_____, 1995, by Gordon Pulliam.

Notary Public

My Commission Expires:

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING TECHNOLOGIES,)
INC., an Oklahoma corporation,)

Plaintiff,)

v.)

No. CJ-93-6523

KIOWA TRIBE OF OKLAHOMA,)

Defendant.)

AFFIDAVIT

STATE OF OKLAHOMA)

SS:

COUNTY OF CADDO)

Billy Evans Horse, of lawful age, being first duly
sworn states:

1. I am currently chairman of the Kiowa
Business Committee, a body of the Kiowa Tribe of
Oklahoma.

2. The Kiowa Tribe of Oklahoma is a federally
recognized Indian tribe.

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3. The Kiowa Tribe of Oklahoma has not waived its sovereign immunity with respect to any matter in this action, nor has it consented to any suit against it for the matters involved in this action.

DATED this 19th day of September, 1995.

FURTHER AFFIANT SAYETH NOT.

S/Billy Evans Horse
BILLY EVANS HORSE

STATE OF OKLAHOMA)
) SS:
COUNTY OF CADDQ)

Signed and sworn to before me on this 19th day of September, 1995, by Billy Evans Horse.

S/Kathy J. Franklin
Notary Public

My Commission Expires:

S/September 15, 1997
(SEAL)

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING TECHNOLOGIES,)
INC., an Oklahoma Corporation,)
)
Plaintiff,)

v.) No. CJ-93-6523
)

KIOWA TRIBE OF OKLAHOMA,)
)
Defendant.)

DEFENDANT KIOWA TRIBE OF OKLAHOMA'S
BRIEF IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

FACTS

The Kiowa Tribe of Oklahoma (Kiowa) is a federally recognized Indian Tribe. 47 Fed. Reg. 53130, 53132 and 53133.

J.T. Goombi, chairman of its business committee, executed the promissory note sued upon as consideration for the purchase of shares in an Oklahoma corporation. That note contains, among other items, the provision:

"Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma"

There is no evidence that Kiowa has waived its sovereign immunity or consented in any way to be sued in this action.

The promissory note is in default as a result of payments not being made.

Kiowa has defended on the basis that, as a federally recognized Indian tribe, it is immune¹ from damage suits, but may, in proper factual circumstances, be subject to certain decrees of an equitable or declaratory nature.

¹ Kiowa is cognizant of this court's September 21, 1994, order overruling its motion to dismiss. The motion was based upon sovereign immunity to damage suits. The court ruled: "Overruled. - Tribal immunity does not extend to going away from the reservation and engaging in business ventures. Defendant granted 20 days to answer. Leamon Freeman" Kiowa, by this brief, seeks to clarify that the claim of immunity is as to damage suits, as opposed to suits of an equitable or declaratory nature. Kiowa re-urges its motion to dismiss in light of the concepts propounded herein.

ARGUMENTS AND AUTHORITIES

A. A FEDERALLY RECOGNIZED INDIAN TRIBE IS IMMUNE FROM DAMAGE SUITS; IT MAY BE SUBJECT TO EQUITABLE OR DECLARATORY SUITS, THOUGH

Kiowa submits that, as a matter of federal law, it is a sovereign entity and immune from damage suits absent a clear waiver or congressional abrogation of that immunity. That law is basic and well established. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L Ed 2d 106 (1978). It is important to note that Kiowa urges here that this immunity is to damage suits,

Confusion as to the nature and extent to this immunity arises from federal case law which permits the entry of various equitable or declaratory decrees, so long as those decrees do not result in an infringement upon tribal self-government or sovereignty. *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 85 S. Ct. 1242, 14 L Ed 2d 165 (1965). Generally, these cases involve attempts by a state either to tax or regulate certain tribal activities. The cases represent a means of deciding disputes among the triad of state/federal/tribal sovereigns.

There is no overriding federal authority which holds a tribe subject to a damage suit in state court, absent a waiver of the tribe's immunity. In fact, federal law is to the contrary.

For an example of a case involving the entry of a declaratory judgment against a tribe, coupled with the refusal of a damage judgment, see *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S. Ct. 905, 112 L Ed 2d 1112 (1991). There the United States Supreme Court ruled that Oklahoma could impose a cigarette tax upon certain cigarette sales in Indian Country² and that the tribe should aid Oklahoma in collection. But, the Court refused a damage judgment against the tribe as a remedial device for its not collecting the taxes. In response to the argument from Oklahoma that immunity cannot insulate a tribe from its business ventures, *Citizen Band*, at 910, the Supreme Court explained:

"A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court, and has been reaffirmed in an number of cases. (citations omitted) . . . Congress has consistently reiterate its approval of the immunity doctrine (citations omitted) . . . Under these circumstances, we are not disposed to modify the long-established principal of tribal

² "Indian Country" is defined 18 USC § 1151. That definition is broader than "reservation" as used in the court's order of September 21, 1994. As technical point, there are no "reservations" in Oklahoma — only "Indian Country".

sovereign immunity."
(emphasis added) *Citizens Band*, at 910.

In a concurring opinion, Justice Stevens, who was not persuaded by the desirability of an immunity concept, nonetheless conceded:

"The rule that an Indian tribe is immune from an action for damages absent its consent is, however, an established part of our law. (citation omitted, emphasis added) *Citizens Band*, at 912.

Citizen Band clearly outlines the federal position, in a single case, that the United States Supreme Court will enter certain decrees respecting an Indian tribe, but will, in the same case, honor the tribes immunity from damage suits.

Thus, an Indian tribe, while perhaps subject to some equitable or declaratory suits, is not subject to a damage suit. This result is reached in a legion of cases. Those cases cannot be confused with cases where there is an equitable or declaratory decree concerning such things as state taxation or regulation of tribal activities.

B. EXTRATERRITORIAL ACTIVITY DOES NOT WAIVE IMMUNITY TO DAMAGE SUITS

Plaintiff has argued, with success, that an Indian tribe, acting off Indian Country, has no sovereign immunity. Plaintiff relies upon *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L. Ed. 2d 114 (1973) which includes the statement:

"Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state laws otherwise applicable to all citizens of the State."

Mescalero is not authority for the concept that a tribe has no immunity to a damage suit. *Citizens Band*, decided seventeen years after *Mescalero*, clearly recognizes immunity to damage suits. Rather, *Mescalero* involved a declaration that a tribe had no broad immunity from state sales taxes arising from its operation of an off-reservation ski resort in New Mexico. In fact, the qualifying phrase from *Mescalero*, cited above, is "Absent express federal law to the contrary . . ." There is indeed federal law to the contrary on damage suits. That law is that tribes are immune. *Citizens Band*, *supra*.

The mere fact that a tribe engages in extraterritorial operation does not waive its federally protected immunity

from damage suit. *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F2d 1166 (10th Cir. 1992) (recognizing tribal immunity and dismissing bank's interpleader as to the tribe and private parties); *Sac and Fox Nation v. Hanson*, 47 F 3rd 1061 (10th Cir. 1995) (recognizing tribal immunity to a damage suit, even though the action arose off Indian Country).

Any waiver of that immunity cannot be implied (as, for example, from going off Indian Country) but must arise from two sources (1) a clear waiver by the tribe, or (2) a Congressional abrogation, *Santa Clara*, *supra*. there is no Congressional abrogation in this case and, rather than a waiver, here the tribe, in the very note sued upon, expressly reserved its sovereign rights. Those reserved rights include immunity.

Thus, while a tribe's activity off of Indian Country may have various implications with respect to state taxation or state regulation, those activities do not constitute a waiver of its immunity from damage suits. This is particularly so when the tribe expressly reserves its sovereign rights.

Because tribal immunity is "an established part of our law" *Citizen Band*, *supra*, and because, in negotiating and documenting a commercial transaction, the parties have ample opportunity to provide for a waiver of immunity if one is desired, a court should not stretch existing law to supply such a waiver. Certainly, such a waiver should not be implied in the face of an express reservation of the tribe's sovereign rights.

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CONCLUSION

Summary judgment is improper, and, in fact, this case should be dismissed. This is so because a federally recognized Indian tribe retains, still, its federally protected immunity from damage suits. While the tribe's extra-territorial activities may expose it to various aspects of state taxation or regulation, and perhaps to equitable decrees, its basic immunity to damage suits remains intact.

S/R. Brown Wallace
R. Brown Wallace
ANDREWS DAVIS LEGG
BIXLER MILSTEN & PRICE
500 West Main
Oklahoma City, OK 73102
Telephone: (405) 272-9241

CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of September, 1995, a true and correct copy of the above and foregoing document was placed in the United States Mail, postage prepaid and addressed to:

John E. Patterson, Jr.
Two Corporate Plaza
5555 N. Grand Blvd., Suite 210
Oklahoma City, Oklahoma 73112

S/R. Brown Wallace

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IN THE DISTRICT COURT OF OKLAHOMA
COUNTY, STATE OF OKLAHOMA

MANUFACTURING
TECHNOLOGIES
Plaintiff(s)

-vs-

KIOWA TRIBE OF
OKLAHOMA
Attorney(s) for Defendant(s)

John Patterson 947-1985
5555 N/ Grand Blvd., Suite 210
OKC 73112
Attorney(s) for Plaintiff(s)

Case No. CJ-93-6523

R. Brown Wallace 272-9241
500 W. Main
OKC 73102
Defendant(s)

COURT MINUTE

Date: September 29, 1995 Judge _____

Hearing On: Plaintiff's Motion For Summary Judg.
Ruling By Court:

Sustained

This action on a note where the defendant received benefit of the note does not entitle them to say I got you(sic) money or goods and now we don't have to pay because

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we are immune. This is a contract action, not a damage suit.

Judgment for plaintiff for \$285,000.00 plus interest, costs and attorney fees.

*S/Leamon Freeman
Judge*

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING TECHNOLOGIES,)
INC., an Oklahoma Corporation,)

Plaintiff,)

v.)

)No. CJ-93-6523

KIOWA TRIBE OF OKLAHOMA,)

Defendant.)

JUDGMENT

On this 13 day of October, 1995, there came on for hearing plaintiff's motion for summary judgment. Upon examination of the pleadings, plaintiff's motion, with affidavits attached and defendant's response, with affidavits attached, the court finds that there is no substantial controversy as to any material fact and that plaintiff is entitled to judgment as a matter of law;

The Court further finds that defendant, Kiowa Tribe of Oklahoma, for good and valuable consideration, made, executed and delivered to Plaintiff, Manufacturing Technologies, Inc., a promissory note dated April 3, 1990, in the principal sum of Two Hundred Eighty Five Thousand

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Dollars (\$285,000.00). The note provided for interest at the rate of Ten Percent (10%) per annum on principal payments made prior to default, and Fifteen Percent (15%) per annum after default.

Default of payments of the principal sum of Forty Seven Thousand Five Hundred Dollars (\$47,500.00) was made on May 3, 1990, and default was made on the balance of the principal sum due on July 2, 1990,

Plaintiff has made demand of Defendant for satisfaction of the sums due and Defendant has failed to pay the sums or any part thereof.

Based upon the aforementioned facts to which no genuine issue exists, the Court finds that Plaintiff, Manufacturing Technologies, Inc., is entitled to judgment as a matter of law against Defendant, Kiowa Tribe of Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that plaintiff, Manufacturing Technologies, Inc., have and recover judgment of and from Defendant, Kiowa Tribe of Oklahoma, for the sum of Two Hundred Eight Five Thousand Dollars (\$285,000.00) accrued interest in the sum of One Hundred Sixty Thousand Four Hundred Seventy Dollars and 83/100's (\$160,470.83) together with costs of this action, and for reasonable attorney fees, as provided in said note, with said note being merged into this judgment.

Dated this 30 day of October, 1995.

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S/Leamon Freeman
LEAMON FREEMON,
Judge of the District Court

Approved:

S/John E. Patterson, Jr.
John E. Patterson, Jr., OBA #6953
Two Corporate Plaza
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(405) 947-1985
Attorney for Plaintiff

S/R. Brown Wallace
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Attorney for Defendant